CF0000058183

(2)

Criminal Appeal (Criminal)

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR.

Criminal Appeal NO: 704/1995.

APPELLANT :

Saffiur Rehman
S/o Shri Sheikh Ahmad,
Aged about 33 years,
R/o Sakin Baijnath Para,
Dhobi Line, Raipur,
District Raipur(M.P.)

- VERSUS-

RESPONDENTS:

The State of Madhya Pradesh,
Through Station In-charge,
Police Station-City Kotwali,
District-Raipur(M.P.)

CONVICTION	SENTENCE
Under Section 302 of the Indian Penal Code.	Imprisonment for life.
AND	AND
Under Section 498-A of the Indian Penal Code.	R.I. for 2 years.

6548

filed on 10/8/95
by Shri S Gaiwal
Advocate

R. to D. R.
Dt. 10/8/95

CRIMINAL APPEAL UNDER SECTION 374(2)
OF THE CODE OF CRIMINAL PROCEDURE, 1973.

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(4C)

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A.F.R.

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मामला क्रमांक Cr.App.704/95 सन् 200

विरुद्ध

आदेश की दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench: -
Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Dhirendra Mishra, JJ.

4.4.2006

Mr. V.D. Bajpayee, Sr. Advocate with Shri R.K. Tiwari, Advocate for the appellant.

Mr. U.N.S. Deo, Additional Public Prosecutor with Shri Ravindra Agarwal, Panel Lawyer for the State/respondent.

Oral judgment dictated on *Dais.*

Per L.C. Bhadoo, J: -

By this appeal under Section 374 (2) of the Cr.P.C. accused/ appellant Safi-ur-rehman has questioned the legality and correctness of the judgment of conviction and order of sentence dated 28th March, 1995 passed by learned 4th Additional Sessions Judge, Raipur, in S.T. No. 2/94, whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Sections 498-A & 302 of the I.P.C., sentenced him to undergo R.I. for two years and to undergo imprisonment for life, respectively.

The case of the prosecution, in brief, is that on 21.6.1996 Mohd. Taj, brother of deceased Mumtaj Begum gave a Dehati Nalishi (Ex.P-13) in the Police Station City Kotwali, Raipur to the effect that his sister Mumtaz Begum, aged about 32 years, was married with Safi-ur-rehman 16 months back and during this period accused used to scold her and about that deceased informed them. Second time when accused took Mumtaz to her

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matrimonial house, he started doubting the fidelity of Mumtaz on the pretext that she was having illicit relations with his brother or any other person and therefore, he started beating deceased. His parents in order to enquire from Mumtaz called her to their residence. Twenty days back in order to celebrate the Eid festival, Safi-ur-rehman came and took Mumtaz to his house. Today he was sleeping in his house, Naseem, brother-in-law of Mumtaz, came and informed that Mumtaz has received burn injuries, on which he along with his mother & younger brother went to Baijnathpara. After seeing Mumtaz in burnt condition, they took her to D.K. Hospital, Raipur for treatment. She was admitted in the D.K. Hospital, Raipur. On enquiry his sister disclosed that her husband Safi-ur-rehman had beaten her, locked her in the room on the pretext that she was having illicit relations and after pouring the kerosene on her body set her on fire. After marriage Safi-ur-rehman used to beat Mumtaz and behave with cruelty and in order to commit her murder the accused after pouring kerosene on her body set her on fire.

Receiving this information, FIR (Ex.P-16) was registered for commission of offence under Sections 498-A & 307 of the I.P.C. The Investigating Officer went to the place of occurrence and prepared the site plan (Ex.P-13). Dying declaration of deceased Mumtaz was recorded by the Executive Magistrate Mr. Ashok Tiwari (PW-9). Kerosene stove, burnt hairs of deceased, one match-box, one Chadar from which smell of kerosene was emanating, broken gold bangles of deceased, blouse, petticoat, saree & odhni of deceased and two 5 liters Jericane of kerosene were taken into

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possession under Ex.P-6. During treatment in the hospital, Mumtaz succumbed to the burn injuries on 21.6.1993, therefore, a merg intimation (Ex.P-17) was given by Dr. S. Pandey, C.M.O., D.K. Hospital and based on that offence was converted into Section 302 of the I.P.C. Panchnama (Ex.P-4) of the body of Mumtaz was prepared by the Investigating Officer. Dr. D.C. Jain (PW-10) conducted the postmortem on the body of deceased Mumtaz and prepared the postmortem report Ex.P-9. Injury report of accused Ex.P-18 was also taken into possession.

After completion of investigation, charge sheet was filed in the Court of learned Chief Judicial Magistrate, Raipur for commission of offence under Sections 498-A & 302 of the I.P.C. against the accused, who in turn committed the case to learned Sessions Judge, Raipur, from where learned 4th Additional Sessions Judge, Raipur received the case on transfer for trial.

The prosecution in order to establish the charge against the accused examined as many as 17 witnesses. Statement of accused was recorded under Section 313 of the Cr.P.C. in which he denied the prosecution evidence and stated that he never beaten the deceased and deceased set herself on fire. Even when he came to know about the incident after hearing the cries of deceased, he immediately came and tried to save her and in that process, he also received the burn injuries on his hands. He further stated that he is innocent and has been falsely implicated in the crime. Learned Additional Sessions Judge after hearing learned counsel for respective parties, convicted and sentenced the accused as mentioned in Para-1 of this judgment.

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We have heard Mr. V.D. Bajpayee, Sr. Adv. with Mr. R.K. Tiwari, Advocate for the appellant and Mr. U.N.S. Deo, learned Additional Public Prosecutor with Mr. Ravindra Agarwal, Panel Lawyer on behalf of the State/respondent.

Death of deceased Mumtaz Begum on account of extensive burn injuries is not disputed.

As far as the involvement of accused/appellant in setting the deceased on fire after pouring kerosene on her body is concerned, there is no direct or ocular evidence in this case, whole case rests on the circumstantial evidence i.e. oral dying declaration made by deceased Mumtaz before her mother Khurshid Begum (PW-1) & father Sheikh Amir (PW-6) and written dying declaration by the deceased before the Executive Magistrate Mr. Ashok Tiwari (PW-9).

As per settled law, in order to rest the conviction based on the circumstantial evidence, the Court is required to ascertain from the circumstantial evidence as to whether the prosecution has been able to establish the involvement of accused in the crime in question based on the following principles laid down by the Hon'ble Apex Court;

1. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
2. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

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3. the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
4. the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

Learned Sr. Advocate for the accused/appellant argued that as per record deceased Mumtaz received burn injuries upto 95%, as such, she was not able to give her statement and moreover, the concerned doctor who gave the certificate, has not been examined, therefore, the dying declaration cannot be believed. He further argued that even the brother, brother-in-law of deceased and other persons have turned hostile and they have stated that the deceased was not in a fit state of mind to give statement. He also argued that deceased set herself on fire and when accused came to know about the incident on hearing cries of deceased, he immediately went near the deceased, tried to save her, even poured the water on her body and in that process the accused/appellant received burn injuries on his hands, which is evident from the injury report Ex.P-18. Therefore, in view of the above facts, the prosecution has utterly failed to establish the crime against the accused/appellant.

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On the other hand, learned Additional Public Prosecutor for the State supported the judgment of trial court.

So far as the admissibility of a dying declaration is concerned, the Constitution Bench of the Hon'ble Apex Court in the matter of Laxman Vs. State of Maharashtra reported in (2002) 6 Supreme Court Cases 710 held that;

" The situation in which a man is on the deathbed is very solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the Courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The Court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any

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adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the Court ultimately holds the same to be voluntarily and truthful."

Therefore, before placing reliance on the dying declaration the Court is required to ascertain;

(1) **that the dying declaration was voluntary and truthful.**

(2) **it is always not necessary that there should a medical opinion or doctor certificate to certify that the deceased was in a fit state of mind to give statement. The witnesses and the person recording the statement i.e. the Magistrate or anybody else, if certifies that the deceased was in a fit state of mind to give statement and that evidence inspires confidence of the court, then the Court can safely place reliance on such**

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evidence. The only requirement is that the Court should reach to the conclusion about the truthfulness and correctness of such evidence and to ensure that the deceased was in a fit state of mind to give the statement.

(3) The court is also required to see that that the statement of the deceased should not be a result of either tutoring, prompting or a product of imagination.

Based on the above principles, if we look into the dying declaration (Ex.P-8) of the deceased recorded by the Executive Magistrate Mr. Ashok Tiwari (PW-9), which has been proved by the Executive Magistrate, shows that on putting questions by Mr. Ashok Tiwari (PW-9), deceased Mumtaz stated before him that in the night of 20.6.1993 her husband after pouring kerosene on her body set her on fire. In reply of Question No.3 as to what kind of family relations was with her husband, she replied that more than one year before she was married with the accused and after the marriage accused used to beat her, as he was doubting her chastity. A certificate has been given by the doctor at 11.15 a.m. in which it has been mentioned that the patient is able to give her statement. Even PW-9 Mr. Ashok Tiwari has stated in his evidence and proved the above statement that certificate was given by the doctor. In the cross-examination, this witness has stated that it is incorrect to say that Mumtaz Begum was unconscious and she was not able to give her statement. He has also denied the suggestion given by the defence counsel that he recorded the statement Ex.P-8 at the instance of

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one Inayat Ali. From the cross-examination of the Magistrate (PW-9), the defence has not been able to elicit any circumstance, which makes the evidence of this witness unreliable or untrustworthy. Mr. Ashok Tiwari (PW-9) is Executive Magistrate, a government servant and independent witness, and without bringing anything on record or in cross-examination, which makes the evidence of this witness doubtful or without showing that either this witness was interested in the deceased or he had any bias against the accused, it is difficult to believe that this independent witness will give a false evidence before the Court. Mr. Ashok Tiwari (PW-9) has categorically stated that Mumtaz Begum was in a fit state of mind to give the statement and the evidence of this witness stands corroborated by the evidence of PW-1 Smt. Khurshid Begum, mother of deceased, before whom deceased made the oral dying declaration. PW-1 has stated in her evidence that on receiving information from the brother-in-law of her daughter about the burn injuries received by Mumtaz, she immediately left for her daughter's house along with her children. When she reached the house of accused, she found that front door of the house was closed, therefore, she went inside the house from the back door and saw that Mumtaz was lying in burnt condition. On enquiry, Mumtaz narrated that the accused had beaten her whole night and since last two days he has not provided food to her. She wanted to go to her parental house but she was locked in the house by her husband. She has further stated that accused set her on fire after pouring kerosene on her body. In the cross-examination this witness has stated that the accused was not in the house and she was so fair while giving her

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evidence that she has admitted that the hands of her son-in-law i.e. accused/appellant herein were also burnt. In Para-2 of her evidence she has stated that accused used to beat her daughter, on hearing such things they used to visit the house of accused and they used to bring Mumtaz to their house where she used to stay for 4-8 days. Thereafter, accused used to come to take the deceased to his house and considering the fact that accused is the husband of her daughter and ultimately she has to reside with her husband they used to send her with him. Even she saw the bruises on the body of deceased on account of beating by the accused.

PW-3 Mohammed Asgar has stated in his evidence that on coming to know about the incident at about 6 a.m. in the morning, he along with other family members went to the house of accused, at that time Mumtaz was talking. He went to bring rickshaw for taking the deceased to the hospital. He has further stated that initially accused & deceased used to live peacefully, thereafter he heard that they used to quarrel and accused used to doubt fidelity of the deceased. PW-6 Sheikh Amir, father of deceased, has stated that he was at Nagpur and he came to know about the incident from the people of vicinity that her daughter has received burn injuries, on which he went to the hospital and saw her daughter. In his presence, her daughter demanded a glass of water from his wife and thereafter, her daughter disclosed that as her husband has beaten her, therefore she is feeling pain on her back. Thereafter, he came back to his residence, as there was nobody at the residence.

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Therefore, from the evidence of Mr. Ashok Tiwari, Executive Magistrate (PW-9), Khurshid Begum (PW-1), Mohammed Asgar (PW-3), cousin of deceased & Sheikh Amir (PW-6), father of deceased, it is established that deceased Mumtaz was in a fit state of mind to give her statement.

As far as the question of prompting & tutoring is concerned, in the cross-examination of Executive Magistrate (PW-9) it has not been elicited that Mumtaz was in any way tutored or prompted to give false statement. There is consistent evidence of mother and father of deceased that accused/appellant used to beat the deceased before the incident, Mumtaz used to come to her parents' house and thereafter accused used to come to take back Mumtaz to his house. Accused used to doubt the fidelity of deceased and on account of that he set her on fire. Therefore, there is nothing on record to show that deceased was tutored or prompted to make false statement. Even, if the doctor is not examined, from the above evidence it is established that the deceased was in a fit state of mind and the dying declaration of deceased inspires full confidence of the Court, as the defence has not been able to elicit any circumstance from the evidence of these witnesses to show that deceased for any bias or anything else gave the false statement in order to implicate her husband in a false case.

As far as argument advanced by learned Sr. Advocate for the accused/appellant that PW-3 Mohammed Asgar, cousin of deceased, PW-8 Mohd. Safi, PW-11 Abdul Hafiz Rizvi & PW-13 Mohd. Taz in their evidence have stated that Mumtaz was unconscious, therefore, she was not in a

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position to give statement is concerned, all these witnesses are closely related to both deceased & accused and they have been declared hostile, therefore, there is every possibility that these witnesses have turned hostile in order to protect the accused and it appears that being relatives of accused they were won over by him that is why they have turned hostile during the trial. Moreover, in presence of evidence of Executive Magistrate-Ashok Tiwari (PW-9), Khursid Begum (PW-1), mother of deceased and Sheikh Amir (PW-6), father of deceased, no much importance can be attached to the evidence of PW-3 Mohammed Asgar, PW-8 Mohd. Safi, PW-11 Abdul Hafiz Rizvi & PW-13 Mohd. Taz.

So far as the argument of learned Sr. Advocate that deceased Mumtaz set herself on fire, accused tried to save her and in that process he also received burn injuries, therefore, it cannot be said that accused set the deceased on fire, is concerned, the medical certificate (Ex.P-18) shows that blisters were present at the tips of all the fingers & thumbs of the accused, but only this circumstance cannot absolve the accused altogether from the offence. As has been discussed above, from the evidence of Ashok Tiwari (PW-9) and PW-1 Khursid Begum, mother of deceased, it is established that the deceased gave oral dying declaration as well as written dying declaration to the effect that the accused after pouring kerosene on her body set her on fire. The defence has not been able to elicit and establish in the cross-examination that the evidence of these witnesses does not inspire confidence of the Court and has also not been able to bring anything on record to show that there was any reason for Mumtaz to implicate the

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accused in a false case. As such mere receiving burn injuries by the accused is of no significance looking to the facts and circumstances of this case and the possibility of fact cannot be ruled out that even after setting the deceased on fire the accused in order to show that he tried to save the deceased might have touched the body of deceased and in that process he received the burn injuries. Therefore, we do not find any substance in this argument.

For the foregoing reasons, we are of the considered opinion that the prosecution has been able to bring home the guilt of the accused regarding subjecting the deceased to cruelty and causing her death by setting her on fire after pouring kerosene on her body and thereby committed the offence under Sections 498-A & 302 of the I.P.C.

In the result, we do not find any illegality or infirmity in the judgment of the trial court; the appeal being devoid of merit liable to be dismissed and same is dismissed.

Sd/-
L.C. BHADOO
Judge

Sd/-
DHIRENDRA MISHRA
Judge

Roshan/-

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12.4.06 22.4.06